here the interveners could not have caveated or registered their interest because they too like the bank were prohibited by the same law already quoted from so doing.

So the position here is that at the time when the interveners became equitable owners of the lands which was later in time than when the documents of title were deposited with the bank, there were two parties with an equitable interest, on the one hand the bank, and on the other each of the interveners, all interests being unregistered and unprotected by caveats.

In these circumstances, whose interest should the court protect?

The law applicable was declared by the Full Court on New South Wales in *Butler* v. *Fairclough*,[2] in terms which were explicitly approved by the Privy Council in *Abigail* v. *Lapin*.[3] These are the words of the Australian court which were approved:

"It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the court in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. *In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority.* But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice. Thus, if an equitable mortgagee of lands allows the mortgagor to retain possession of the title deeds, a person dealing with the mortgagor on the faith of that possession is entitled to priority in the absence of special circumstances to account for it.

Under the Australian system a clear title on the register is, for some purposes at any rate, equivalent to possession of the title deeds. A person who has an equitable charge upon the land may protect it by lodging a caveat, which in my opinion operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat." (My italics.)

In approving the above statement of the law, Lord Wright said at page 502:

"Their Lordships think that case was rightly decided, though it may be that the statement as to retention of the title deeds needs some qualifications."

So in deciding this contest between the bank on the one hand and the interveners on the other, the court should decide in favour of the bank as being first in time, if but only if other things are equal. The court should act on the above principle in the absence of caveats and registrations. The qualification that other things must be equal is important, for an equitable claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing an equitable claimant later in time to act to his prejudice.

In this case was the bank in any way guilty of any act or omission which had or might have had the effect of inducing the interveners to act to their prejudice? I do not think so. If they had been allowed by law to caveat their lien no doubt they would have done so, but they were not so allowed. They had therefore done all they could to protect their interest by taking possession of the documents of title. During the course of arguments it was stated that the bank had parted with possession of the titles, but this is nowhere stated in any of the interveners' affidavits, and in any event counsel for the bank stated that the bank had given the titles to their solicitor and I agree that possession by their own solicitor was possession by the bank. There is no evidence one way or another who had possession of the titles at the time when the land owners executed transfers in favour of each of the interveners, though we know that they are now deposited with the court as a result of court order in Civil Suit No. 50 of 1972 filed on April 27, 1972, by the interveners in which they ask for a declaration that they are legal owners of the lands.

I would respectfully disagree with the learned trial judge and rule that the bank's earlier equitable interest should have priority over the interveners'. This is no doubt hard on the interveners who had parted with their money and would not have known of the bank's equitable interest even if they had inspected the register and who were themselves prohibited by law from caveating the lands.

I would accordingly set aside the learned judge's order, so that the effect of my judgment would have been to revive the prohibitory order in favour of the bank.

Raja Azlan Shah and **Wan Suleiman F.JJ.** concurred.

Order accordingly.

Solicitors: *Rithauddeen & Aziz; Wilson & Co.*

GOVERNMENT OF MALAYSIA v. OOI KHENG KEE

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) November 28, 1975]

[Kota Bharu — Federal Court Civil Appeal No. 155 of 1974]

Administrative Law — Suit against Government — Whether suit out of time — Public Authorities Protection Ordinance, 1948 — Public Authorities Protection (Amendment) Act, 1974 (Act A 252).

In this case the respondent had brought a suit for loss of support and dependency and for damages arising out of the death of her son who was killed when travelling in a RMAF helicopter which crashed in Kuantan. The appellant had applied for the proceedings to be set aside for non-compliance with the Public Authorities Protection Ordinance, 1948, as the suit was brought over twelve months after the accident. The application had been dismissed in the High Court and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) as the pleadings stood it could not be taken for granted that the act of the Government complained of was an act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, as stipulated by section 2 of the Public Authorities Protection Ordinance, 1948;

(2) the period of limitation of twelve months had been extended to thirty-six months by the Public Authorities Protection (Amendment) Act, 1974 (Act A 252) and it was arguable that this amendment was retrospective, so as to save the suit.

FEDERAL COURT.

Abu Talib bin Osman (Senior Federal Counsel) for the appellant.

A. Wilson for the respondent.

Suffian L.P. (delivering the judgment of the Court): On March 11, 1972, an RMAF helicopter crashed at the 11th m.s., Kampung Gambang, Kuantan. Flying Officer Lim Bok Choon who was travelling on it was killed. His old mother sues the Federal Government for loss of support and dependency and for damages.

The Government applied by summons-in-chambers for the proceedings to be set aside for non-compliance —

(a) with the provisions of the Government Proceedings Ordinance, 1956; and

(b) with the Public Authorities Protection Ordinance, 1948 (the suit was brought over twelve months after the accident).

When the application was heard, the government proceeded only on ground (b) and the learned judge dismissed the application on the ground that at the time of the summons-in-chambers the government had not even filed their statement of defence. The judge considered that the fact that by the time the summons was heard the government had filed their defence pleading among other things limitation, did not matter.

We dismissed the government's appeal from the learned judge's judgment; we upheld it but, as stated during arguments, for reasons that are different.

The government argued that, as the Public Authorities Protection Ordinance applied, this suit was out of time as it had not been commenced within twelve months next after the act, neglect or default complained of, as stipulated by paragraph (a) of section 2 of the Ordinance. To agree with the government at this stage would be to accept without proof that the act of the government complained of was "an act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority." As the pleadings stand, these things cannot be taken for granted. Also Act A252 has extended the period of limitation from twelve months to thirty-six months, and as stated by Mr. Wilson for the plaintiff it is arguable that this amendment may be retrospective, so as to save this suit though brought after twelve months.

Appeal dismissed.

Solicitors: *Wilson & Co.*

CHOP SOON HOE v. TAN KEE

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) and Wan Suleiman F.J.) December 16, 1975]

[Kuala Lumpur — Federal Court Civil Appeal No. 72 of 1975]

Landlord and Tenant — Notice to quit — Tenant in arrears in payment of rent — Controlled tenancy — Whether subject to provisions of National Land Code — National Land Code, section 235 — Control of Rent Act, 1966, s. 16(1).

The respondent had obtained judgment for possession of premises, of which the appellant was the tenant, and the judgment had been upheld in the High Court. The appellant appealed to the Federal Court. One of the grounds of appeal was that the respondent (landlord) should have served a notice in writing under section 235, of the National Land Code.

Held, dismissing the appeal: (1) the learned appellate judge was right when he held that on the evidence the rent of the premises was payable in arrear at the end of the month, that it was payable on demand at the premises, that it was demanded on the premises not once but many times, that it was not paid and was in arrear for more than 14 days and that a valid notice to quit had been served on the appellant;

(2) section 235 of the National Land Code deals with tenancies generally, whereas the Control of Rent Act deals specially with controlled premises and section 235 of the National Land Code cannot apply to controlled tenancies which are regulated by the Control of Rent Act.

FEDERAL COURT.

Kam Woon Wah for the appellant.

Atma Singh Gill for the respondent.

Suffian L.P.: The plaintiff owns shophouse 27 Paul Street, Seremban, of which the defendant is the tenant. The shophouse is subject to the Control of Rent Act, 1966. The plaintiff claimed possession under section 16(1)(a) of the Act on the ground that the rent lawfully due had been in arrear for fourteen days or more.

The plaintiff won her case in the Magistrate's Court and again (on appeal by the defendant) in the High Court.

The defendant appeals to us.

In my judgment this appeal should be dismissed.

To succeed, the plaintiff had to prove that —

(1) the rent was payable either in advance or in arrear;

(2) the rent was payable on demand somewhere;

(3) rent was demanded at the right place;

(4) it was not paid and was in arrear for 14 days or more; and

(5) a valid notice to quit had been served on the defendant.

With respect, I think that the learned appellate judge was right when he said that on the evidence the rent was payable in arrear at the end of the month, that it was payable on demand on the premises, that it was demanded on the premises not once but many times, that it was not paid and was in arrear for more than 14 days, and that a valid notice to quit had been served on the defendant.

There was ample oral evidence which if believed (as it was) would prove that the defendant was a bad paymaster. This was more than corroborated by the four receipts produced. The one at page 81 of the record shows that the defendant did not pay rent due